BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SHAWN GRAY, Claimant, v. R.F. COON LOGGING, INC., Employer, and ASSOCIATED LOGGERS EXCHANGE, Surety, Defendants.	)	**IC 02-012769** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed: December 9, 2004

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Rinda Just. She conducted a hearing in Lewiston, Idaho, on April 9, 2004. Thomas W. Callery of Lewiston, Idaho, represented Claimant. Alan K. Hull of Boise, Idaho, represented Defendants. The parties presented oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The case came under advisement on August 9, 2004, and is now ready for decision.

ISSUE

As modified and agreed upon by the parties at hearing and in their briefs, the sole issue to be resolved is: Whether and to what extent Claimant is entitled to permanent partial impairment (PPI).

CONTENTIONS OF THE PARTIES

Claimant contends he is entitled to a PPI rating of 4% of the whole person. He asserts that his testimony and medical evidence are credible and support such a rating. He relies heavily on the opinion of Robert C. Colburn, M.D.

Defendants contend that Claimant is only entitled to a 1% PPI rating. They assert that Dr. Colburn did not make proper use of the AMA *Guides to the Evaluation of Permanent Impairment*, Fifth Edition. They rely heavily on the opinions of Orie E. Kaltenbaugh, M.D., and J. Gerald McManus, M.D.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant;
2. Claimant's Exhibits 1 – 10, admitted at hearing;
3. Defendants' Exhibits 1-14, admitted at hearing;
4. Industrial Commission Legal File;
5. Post- hearing deposition of Dr. Colburn;
6. Post-hearing telephonic deposition of Dr. McManus; and
7. The AMA *Guides to the Evaluation of Permanent Impairment*, Fifth Edition (AMA Guides), of which the Referee takes notice.

The objections on pages 44 and 52 of Dr. Colburn's Deposition are sustained. After having considered all the above evidence and the briefs of the Parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 40 years of age and living in Kamiah, Idaho.

Claimant was not working at the time of the hearing because of spring layoff. He anticipated returning to work soon for Blue Mountain Construction.

2. Claimant began working for Employer May 29, 2002. Claimant testified that he was injured on July 21, 2002 while he was "hooking," i.e., "wrapping chokers around logs, sending them up the hill." Hearing Transcript, p. 17. Claimant stated that the ground was "steep" where he worked and that he "tripped, stumbled" many times that day. *Id.* at 17.

3. Claimant asserted that he noticed the pain in his left knee the following morning: "In the morning when I woke up, I noticed pain to my (left) knee and it was – had swelling. . . . Well, it was swelled pretty good, [sic] but it wasn't the swelling so much as the inside of it. It had a puffy feeling inside the joint." *Id.* at 18, 19.

4. Claimant properly notified Employer. On August 2, 2002, Claimant saw Amy L. Schochler, D.O. and was off work for one week.

Claimant's Testimony re Medical Treatment

5. Claimant testified about his medical treatment as follows. He went to Dr. Kaltenbaugh, who diagnosed a meniscus tear of the left knee and then performed surgery. Subsequently, Claimant did physical therapy at the St. Maries Clinic in Kamiah. He missed approximately five physical therapy visits because "(m)y car was not running very well. I was sick." *Id.* at 23.

6. Claimant was released by Dr. Kaltenbaugh on December 15, 2002 and had a follow up visit on February 11, 2003. Defendants' Exhibit 3, p. 0018. When Claimant was asked whether he saw Dr. Kaltenbaugh after February 2003, Claimant replied in the negative. "I don't believe I did." Hearing Transcript, p. 25.

7. Claimant stated that he went to Dr. Colburn, who examined him "very thoroughly."

Id. "I'm thinking about an hour, maybe a little longer" for the examination. *Id.* Claimant stated that he knew that Dr. Colburn had previously rated him as 1% PPI (prior to having physically examined Claimant, but after having reviewed Dr. Kaltenbaugh's records).

8. In contrast, Claimant asserted that "the entire time that I spent with Dr. Kaltenbaugh would probably be under ten minutes speaking to him. . . With every – you know, and that's combining every visit that I had with him." *Id.* at 26.

9. Claimant had a home program that he was to continue when formal physical therapy ended. Claimant testified that he stopped doing home exercises because "basically, I got tired of doing them." *Id.* at 29. He stated that both the physical therapist and Dr. Kaltenbaugh had told him to continue doing the home program.

10. Claimant asserts that he can see the difference in size between his left thigh and calf and his right thigh and calf. He testified that he became aware of the difference because "(m)y physical therapist made a mention of it because she was worried about it." Id. at 37.

Medical Records

11. Dr. Kaltenbaugh, a board certified orthopedic surgeon, diagnosed Claimant with a meniscus tear of the left knee. On September 9, 2002, Dr. Kaltenbaugh performed a left knee arthroscopy with partial lateral meniscectomy on Claimant. Dr. Kaltenbaugh saw Claimant for follow up on October 1 and 29, and December 5, 2002. Dr. Kaltenbaugh's October 1 office note indicates that Claimant was to begin physical therapy; his December 5 office note indicates that a work release was given through December 15, 2002. Claimant returned for a follow up on February 11, 2003. The office note of that date states: "The swelling has resolved. [Claimant] feels that he is functioning satisfactorily as far as walking, lifting and carrying. He is to return PRN." Defendants' Exhibit 3, p. 0011.

12. In a letter dated March 6, 2003, Essam Assaad, Senior Claims Examiner with Surety, asked Dr. Kaltenbaugh for a rating of Claimant "using the AMA guidelines." *Id.* at 19. Dr. Kaltenbaugh wrote on that same letter: "1% whole person," and signed and dated the rating March 11, 2003. *Id.*

13. At the request of Claimant, Dr. Colburn, an orthopedic surgeon who retired from his senior position with Lewiston Orthopedic Associates and is now an employee of that group, reviewed Claimant's medical records. In a letter dated May 15, 2003, Dr. Colburn noted that Claimant had a work-related injury and a subsequent partial lateral meniscectomy. He further wrote that Claimant: "did have some complaints of stiffness;" "did not feel that he regained full strength;" had "no effusion in the knee," and had "full range of motion." Dr. Colburn opined:

> Based on those facts, I think the impairment rating of 1% of the whole person is reasonable and does conform to the Fifth Edition of the AMA guides. This is noted in chart 17-33, page 564, under partial meniscectomy, either medial or lateral.

Claimant's Exhibit 2, p. 110. Moreover, Dr. Colburn continued in his letter:

> If he were to have a significant or measurable atrophy of the right (sic) thigh musculature that would support an additional impairment. I could find no indication of this in the records, including the physical therapy reports.

Id.

14. At Claimant's request, Dr. Colburn saw Claimant on May 29, 2003 for an independent medical examination (IME). In a letter dated May 28 [sic], Dr. Colburn discussed the IME. Dr. Colburn noted a number of subjective complaints voiced by Claimant, including: weakness, pain, and stiffness in the left knee, pain in the right knee that was not present before the left knee injury, numbness below the left knee on the lateral aspect of the calf, a sense of giving way, clicking in both knees, and atrophy of the left leg. On exam, Dr. Colburn found " a trace of effusion in the left knee, some local tenderness, . . . relative atrophy of the left thigh and left calf. . . ." *Id.* at

114. Dr. Colburn opined as follows:

> Although I could not find, based on this evaluation, a clear cut reason for his rather slow recovery from what appears to be a fairly straight forward situation, I think that the injury situation in his left knee is stable at the present time and that no further interventional or formal therapy is indicated.

Id. Dr. Colburn rated Claimant as follows:

(a) for the partial lateral meniscectomy, 1% PPI of the whole person;

(b) for the moderate unilateral thigh muscle atrophy 3% PPI;

(c) for the mild unilateral calf muscle atrophy 1% PPI.

Dr. Colburn opined that "(t)his would add to a total of 5% whole person impairment." *Id.* Finally, Dr. Colburn made an additional note:

> I could not determine to my satisfaction, at least, a reason for his rather delayed recovery from what, on the surface, appears to be a pretty clear cut condition and an adequate treatment program. I did sense on this admittedly brief and one time contact with [Claimant] that there were other psycho-social-physiological aspects to his problem.

Id. at 114, 115.

15. At his deposition, Dr. Colburn opined why he disagreed with Dr. Kaltenbaugh's 1% rating:

> Well, I think Dr. Kaltenbaugh rated it relative to this diagnosis- based table that we referred to as for a lateral meniscectomy. At the time I examined the claimant, I think the leg weakness was there and the measured atrophy was present, and so I didn't disagree with his rating at that time, but I think I thought that in view of this atrophy that the [sic] rating it on the basis of the muscle atrophy was the more appropriate method of rating.

Colburn Depo., p. 41.

16. In his testimony, Dr. Colburn admitted that he had erred when he had combined the ratings for muscle atrophy with that of the diagnosis-based condition to calculate the 5% PPI rating contained in his May 28 letter. *Id.* at 24. Dr. Colburn calculated a new PPI rating of 4% based on

the moderate muscle atrophy of the thigh (3%), and the mild muscle atrophy of the calf (1%), which he combined to yield 4% whole person impairment.

17. Surety scheduled Claimant for an IME with Dr. McManus, a board certified orthopedic surgeon. When Claimant did not attend the appointment, Dr. McManus wrote a report based on his review of the medical records of Drs. Schochler and Kaltenbaugh and Dr. Colburn's IME report. In his deposition, Dr. McManus testified that he started doing IMEs in 1988 and his practice is now primarily "independent medical exams, ratings, [and] second opinions." McManus Depo., p. 10. The majority of the IMEs performed by Dr. McManus are done at the request of insurance carriers. *Id*. at 45. In his report, Dr. McManus expressed his agreement with Dr. Kaltenbaugh's 1% PPI rating. Defendants' Exhibit 5, p. 0028.

18. Dr. McManus explained his disagreement with Dr. Colburn's opinion in his report and in his deposition. He noted that Dr. Colburn's measurements of Claimant's left thigh and left calf were **both** proportionally smaller than the right thigh and right calf. Dr. McManus asserted that this was significant because **unless** Claimant had a preexisting difference in right and left leg measurements **before** the work-related accident, Claimant should have shown "very little difference in his [left] calf" **after** the work-related accident. Dr. McManus Deposition, p. 18. Dr. McManus explained that after knee surgery, the quadriceps muscles (located above the knee), become inhibited and weak while the calf muscle does not. "And so, the quadriceps muscle shrinks disproportionately to all of the other muscles." *Id.* at 20. Dr. McManus concluded that the atrophy in Claimant's left leg was "most likely preexisting and based on that left leg being smaller than the right." *Id.* at 25.

19. Counsel fairly summarized the report of Douglas Crum, C.D.M.S., Vocational Rehabilitation Consultant, Industrial Commission Rehabilitation Division, that Claimant had begun "working continuously falling oversized logs," the job sites were "not as steep" as at his work-

related accident, the "work was going fairly well," and, "the knee felt better than it did a year before [time of evaluation]." Defendants' Exhibit 9, p. 0099. Dr. McManus then responded to questions about what conclusions could be drawn about Claimant's knee condition. Dr. McManus opined:

> My picture of it is that perhaps [Claimant] for some reason or another wasn't as vigorous with his rehab during the physical therapy, and then there was a delay in getting him back to work. And so I think that the rehabilitation was probably prolonged somewhat.

McManus Depo., p. 26. When asked whether once Claimant got back to being active he then started regaining strength and the knee started functioning, Dr. McManus replied: "Right. Loggers – that's pretty good exercise on quadriceps." *Id.*

DISCUSSION AND FURTHER FINDINGS

Permanent Impairment

1. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

In the present case, both Drs. Kaltenbaugh and McManus have assigned a whole person PPI rating of 1% to Claimant. Dr. Kaltenbaugh's rating was handwritten on the letter he received from

Surety; and was signed and dated. While an explanation of the rating might have been more helpful, the form of the rating does not diminish the fact that Dr. Kaltenbaugh, as the treating physician, had extensive and direct knowledge of Claimant, including knowledge of his condition soon after the injury and throughout his recovery.

Dr. McManus' rating was based on a thorough review of medical records of the treating physicians, and Dr. Colburn's IME. Claimant admitted his failure to keep his appointment with Dr. McManus: "I believe I had an appointment, but I couldn't make it." Tr., p. 28. Dr. McManus cogently explained that the rating for a meniscus tear depends on how much meniscus is removed during surgery. Thus, "when you take a partial meniscus out and then leave the peripheral border, the rating is 1 percent." Indeed, even Dr. Colburn originally assigned Claimant a 1% rating. This rating is clearly apparent from Table 17-33 from the AMA Guides.

Dr. McManus cogently explained the significance of Dr. Colburn's post-injury measurements of Claimant's left leg. Those measurements showed that the left thigh **and** calf were smaller than the thigh and calf on the right. While Dr. Colburn concluded that the difference was proof of atrophy, Dr. McManus opined: "I think the pattern is not one of quadriceps atrophy from a knee injury, but rather it's a symmetrical pattern equal in the upper and lower leg." McManus Depo., p. 28. Such a symmetrical pattern suggests a normal variant or a cause other than the partial meniscectomy.

In what proved to confuse rather than clarify the matter, Dr. Colburn first rated Claimant at 1% PPI based on his review of the medical records. After examining Claimant, Dr. Colburn revised his calculation to a 5% impairment to account for the partial meniscectomy combined with the atrophy of the left leg. Dr. Colburn later abandoned the 5% rating because he had used improper methodology, and revised his rating to 4% PPI.

Dr. Colburn's rationale for his various ratings is not convincing. Significantly, he lacked original measurements of the left thigh and calf to establish if, and to what degree, atrophy might have occurred. Moreover, as Dr. Colburn himself opined when he initially gave a 1% rating:

> If he were to have a significant or measurable atrophy of the right [sic] thigh musculature that would support an additional impairment. I could find **no** indication of this in the records, including the physical therapy reports (emphasis added).

Here, the Referee finds the opinions of Drs. Kaltenbaugh and McManus most persuasive. Indeed, Dr. Colburn originally described the condition as "pretty clear cut" and was of the same view as Drs. Kaltenbaugh and McManus. The Referee concludes that Claimant has a permanent partial impairment rating of 1% of the whole person.

CONCLUSION OF LAW

1. Claimant sustained a knee injury caused by a work-related accident on July 21, 2002. As a result of the accident, he has incurred a permanent partial impairment (PPI) rating of 1% of the whole person. Defendants are to be credited with any amount previously paid.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this 30th day of November, 2004.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2004, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501-0854

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

djb /s/_____